

### **Remarks**

The above Amendments and these Remarks are in reply to the Office Action mailed January 28, 2005. No fee is due for the addition of any new claims.

Claims 1-6, 9-23 and 26-40 were pending in the Application prior to the outstanding Office Action. In the Office Action, claims 1-6, 9-23 and 26-40 were rejected. The Applicant has cancelled claims 17, 20, and 22, and has added new claims 41-43. Accordingly, Claims 1-6, 9-16, 18, 19, 21, 23, and 26-43 are currently pending. Reconsideration of the claims is respectfully requested.

### Objection to the Specification

Within the Office Action, the specification has been objected to for failing to provide proper antecedent basis for the terms “members” used in the claims. The Applicant has amended paragraph [0023] in the present application to include the word “member” to bring the specification in conformity with the originally filed, as well as amended, claims. Accordingly, the specification has been corrected and the objection has been overcome.

### Claim Rejections under 35 U.S.C. 112

Within the Office Action, claims 16-20 as well as claims 22 and 23 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the invention. In particular, it is stated within the Office Action that the configurations in Claims 16-20 and 22-23 appear to conflict one another. The Applicant respectfully disagrees and traverses. However, to expedite prosecution of the present application, the Applicant has cancelled claims 17, 20 and 22. Accordingly, Claims 16, 18, 19, 23 are in a condition for allowance.

### Rejections Under 35 U.S.C. 102

#### Ferree

Within the Office Action, claims 1, 4-6, 9-12, 14, 21-23 and 35-40 have been rejected under 35 U.S.C. 102 as being anticipated by U.S. Patent Publication 2004/0106998 to Ferree (hereinafter

“Ferree”). Enclosed is a signed DECLARATION OF PRIOR INVENTION UNDER 37 C.F.R. § 1.131 for swearing back of the date of the present invention prior to the effective filing date of Ferree. For at least these reasons, the rejection of claims 1, 4-6, 9-12, 14, 21-23 and 35-40 based on Ferree is traversed. Accordingly, claims 1, 4-6, 9-12, 14, 21-23 and 35-40 are in a condition for allowance.

### Wagner

In addition, claims 1-6, 9-23 and 26-40 have been rejected under 35 U.S.C. 102 as being anticipated by U.S. Patent 6,706,070 to Wagner et al (hereinafter “Wagner”). The Applicant respectfully traverses.

The present invention is directed to an implant which has a first end plate and a second end plate, whereby the first end plate attaches to a first vertebral body and the second end plate attached to an opposed second vertebral body. The first end plate and the second end plate both have an inner surfaces which face one another. Preferably along the inner surface of the first end plate is a first socket and along the inner surface of the second end plate is a second socket. A spacer, having a first bar and a second bar which are preferably perpendicular to one another, is configured to be positioned between the inner surfaces of the first and second end plates. The bars of the present spacer preferably sit in the respective first and second sockets such that the first end plate and the second end plate are able to move with respect to one another. The spacer thus allows the first and second end plate to continuously and selectively accommodate flexion, extension and lateral bending of the vertebral bodies whenever the patient desires.

Wagner teaches an alignment device that fuses adjacent vertebrae together. In particular, the Wagner device has a height adjustment feature which alters the vertical height between the engaging plates during implantation to achieve the natural shape of the spine when the vertebrae are fused. The struts, however, do not allow the upper or lower engaging plates to continuously and selectively pivot about the struts. In other words, the Wagner device does not allow the vertebral bodies to undergo flexion, extension and/or lateral bending. Regarding the embodiments shown in Figures 38 and 42-49, each of the embodiments include 2 or more screws positioned between the upper and lower engaging plates. The screws are each attached to a non-moveable cam block in the center, whereby each screw includes a movable cam block thereon. The screws, when turned, cause the cam block to move towards the outer

edges of the upper and lower engaging plates, thereby forcing the upper and lower engaging plates away from each other. Thus, the screws and cam blocks of the Wagner device only serve to adjust the height between the upper and lower engaging plates. Again, the upper and lower engaging plates and screws in the Wagner device, however, do not allow for continuous, selective bending of the vertebral bodies to undergo flexion, extension, and/or lateral bending.

In contrast to the present invention, the fusion device in Wagner does not pivot to facilitate either flexion, extension or lateral bending. As admitted in the Office Action, the device in Wagner is a fusion device which does not allow the vertebral bodies to selectively move after being implanted. Claims 1, 21, 26, 39 and 40 include the limitation that the implant accommodates at least one of flexion, extension and lateral bending. Claims 35 and 36 recite that the implant allows continuous selective movement of the vertebral bodies. For at least these reasons, Wagner does not read upon independent Claims 1, 21, 26, 35, 36, 39 nor 40. Accordingly, Claims 1, 21, 26, 35, 36, 39 and 40 are distinguishable over Wagner and are thus in a condition for allowance.

Claims 2-6, 9-16, 18, 19, 21 and 23 were also rejected under 35 U.S.C. 102(e) as being anticipated by Wagner. Claims 2-6, 9-16, 18, 19, 21 and 23 are dependent on independent Claim 1. As stated above, Claim 1 is allowable over Wagner. Accordingly, Claims 2-6, 9-16, 18, 19, 21 and 23 are allowable for being dependent on an allowable base claim. Claims 27-34 are dependent on independent Claim 26. As stated above, Claim 26 is allowable over Wagner. Accordingly, Claims 27-34 are allowable for being dependent on an allowable base claim. Claims 37 and 38 are dependent on independent Claim 36. As stated above, Claim 36 is allowable over Wagner. Accordingly, Claims 37 and 38 are allowable for being dependent on an allowable base claim.

#### Rejections under 35 U.S.C. 103

Within the Office Action, claims 15-20 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Ferree in light of PCT Patent Application WO 01/01893 to Marnay. For the reasons stated above, Ferree is not considered prior art in relation to the present application. Accordingly, Claim 1 is not anticipated by Ferree, and one skilled in the art would, therefore, have no motivation to utilize

Ferree with Marnay to reach the invention claimed in Claims 15-20. Therefore, Claims 15-20 are patentable and thus allowable over Ferree and Marnay, individually or in combination.

#### New Claims

The Applicant has added new dependent claims 41-43. The Applicant submits that the new dependent claims are allowable over the prior art, are fully supported by the specification and do not contain new matter. The Applicant respectfully requests considerations of new Claims 41-43.

In light of the above, it is respectfully submitted that all of the claims now pending in the subject patent application should be allowable, and a Notice of Allowance is requested. The Examiner is respectfully requested to telephone the undersigned if he can assist in any way in expediting issuance of a patent.

The Commissioner is authorized to charge any underpayment or credit any overpayment to Deposit Account No. 06-1325 for any matter in connection with this response, including any fee for extension of time, which may be required.

Respectfully submitted,

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